

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

December 13, 2001

EAGLE ENERGY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 98-72-R
	:	Citation No. 7166391; 3/11/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 98-73-R
ADMINISTRATION (MSHA),	:	Citation No. 7166392; 3/11/98
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-123
Petitioner	:	A.C. No. 46-07711-03674
v.	:	
	:	Mine No. 1
EAGLE ENERGY, INC.	:	
Respondent	:	

REMAND DECISION

Before: Judge Feldman

These consolidated contest and civil penalty cases have been remanded by the Commission. 23 FMSHRC 1107 (Oct. 2001). These matters concern the failure of three Eagle Energy, Inc. (Eagle Energy) foremen to note nine hazardous kettle bottoms during the course of 17 preshift and onshift examinations. The kettle bottoms were observed by MSHA inspectors on February 26, 1998, shortly after they arrived at the No. 1 mine to investigate an unrelated fatal rib roll accident. *Id.*

A kettle bottom is the oblong or cylindrical fossilized remains of a tree trunk that is embedded in a mine roof. *Id.* at 1108 n.2. Kettle bottoms are exposed during the mining process and they are frequent occurrences at Eagle Energy’s No. 1 mine. *Id.* at 1108. Kettle bottoms are hazardous because they can drop out of a mine roof without warning, sometimes causing serious injuries to miners. *Id.* at 1108 n.2. Thus, kettle bottoms require supplemental roof support to ensure that they do not suddenly fall from the roof. *Id.* at 1108-09.

When kettle bottoms are exposed during the course of mining, it is common for Eagle Energy's foremen to identify them with spray paint to alert roof bolters that additional support is needed. *Id.* at 1109; Tr.II 558, 850-51.¹ The proper way to support a kettle bottom is to secure the kettle bottom's perimeter with bolted half-headers or roof plates to prevent its separation from the roof. *Id.* at 1109.

Three of the nine kettle bottoms were located in close proximity to each other, in a cluster, in a heavily traveled area of the mine in the No. 2 entry 27 feet in by the dumping point. *Id.* These three kettle bottoms were highlighted by orange spray paint. *Id.* The painted kettle bottom cluster was photographed by Mine Safety and Health Administration (MSHA) inspector Vaughn Gartin. *Id.*; Gov. Ex. 11A-E. After six additional unpainted kettle bottoms had been detected by MSHA inspectors, Eagle Energy vice-president Larry Ward instructed safety director Jeffrey Bennett to use orange spray paint to identify these six conditions for additional roof support. 23 FMSHRC at 1111.

One of the three painted kettle bottoms had a line spray painted through it. The initial decision determined that the line was a centerline that typically is drawn by the section foreman, or at his direction, at the completion of a mining cycle to ensure that the continuous miner stays on course as it advances during the next cut. *Eagle Energy, Inc.*, 22 FMSHRC, 860, 863 (July 2000)(ALJ); Tr.II 248, Tr.III 62, 445.

The initial decision determined Eagle Energy's repeated failures to note these hazardous roof conditions were significant and substantial (S&S) violations of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1). These mandatory safety standards require adequate preshift and onshift examinations. *Id.* at 874-76. The initial decision also determined the cited violations were attributable to Eagle Energy's unwarrantable failure. *Id.* at 876-78.

In its remand, the Commission affirmed the fact of occurrence of the violations of sections 75.360(b) and 75.362(a)(1) as well as their S&S nature.² 23 FMSHRC at 1118. However, the Commission vacated the unwarrantability determination and the \$12,000 civil penalty imposed and remanded these matters for reevaluation consistent with its opinion. Specifically, the Commission rejected application of the "missing witness" rule to draw the adverse inference that Eagle Energy failed to call the foreman responsible for drawing the centerline through the kettle bottom because that foreman's testimony would have been unfavorable to Eagle Energy. The Commission concluded application of the missing witness rule was unreasonable because the identity of the witness who painted the kettle bottoms apparently was not known to either party. 23 FMSHRC at 1120.

¹ The hearing in these matters was conducted in three sessions. The transcript pages are referred to by session using Roman Numerals I, II and III, followed by the page number.

² As noted by the Commission, Eagle Energy did not appeal the initial S&S determination. 23 FMSHRC at 1113, n.10.

Consequently, the Commission directed that . . .

[o]n remand, the judge must reexamine the record and any reasonable inferences [footnote omitted] to be drawn from it to determine whether the Secretary has established by a preponderance of the evidence that the kettle bottoms were painted as early as February 24, whether they were painted later, or whether there is evidence in the record as to when they were painted. [Footnote omitted]. If the Secretary failed to establish when the cluster of kettle bottoms was painted, the judge must nevertheless also consider whether any miners saw or should have discovered the kettle bottoms.

23 FMSHRC 1121.

As a threshold matter, in remanding these cases, the Commission concluded that all of the nine subject roof conditions were hazardous kettle bottoms that were exposed during the normal mining cycles between February 24 and February 26, 1998, rather than the harmless roof irregularities alleged by Eagle Energy. 23 FMSHRC at 1118. With respect to the three painted kettle bottoms, the Commission concluded they were exposed during the mining cycle on February 24, 1998. *Id.* Finally, the Commission concluded the orange paint sprayed on the cluster of kettle bottoms was a signal that additional roof support was needed, rather than graffiti or doodling as claimed by Eagle Energy. *Id.* at 1117. These Commission findings are important considerations in resolving the unwarrantability issue. While it is understandable that preshift and onshift examiners would repeatedly ignore harmless roof irregularities or graffiti, it is inexcusable that these examiners would fail to note hazardous kettle bottoms, especially those that had been identified because of their need for supplemental roof support.

Discussion

During the period February 24 through February 26, 1998, preshift and onshift examinations at Eagle Energy's Mine No. 1 were performed by section foreman. For the reasons discussed below, the Secretary has met her burden of proving that the line painted through the painted kettle bottom was a centerline that was painted by, or at the direction of, the day shift section foreman on February 24, 1998. The Secretary has also demonstrated, by circumstantial evidence, that the foreman responsible for painting the centerline also contemporaneously identified the kettle bottom cluster with spray paint to alert the roof bolter that additional roof support was required. Moreover, even if the foreman who painted the centerline failed to detect and paint the kettle bottom that intersected it, such failure by that foreman to note the kettle bottom hazard in subsequent onshift and preshift examinations would still constitute unwarrantable conduct. In addition, the repeated failure of preshift and onshift examiners to note these painted hazards was unwarrantable even if the examiners lacked actual knowledge of the conditions because they failed to see them. In this regard, the examiners' failure to know that a subordinate had identified a dangerous roof condition would evidence inadequate supervision and training that would also constitute unwarrantable conduct attributable to Eagle Energy. Finally,

based on common law principles of agency, Eagle Energy cannot prevent imputation of a foreman's negligence by asserting that it is unable to identify the foreman, or that it was unaware of the foreman's conduct.

A linchpin in determining when the kettle bottom cluster was painted is the line spray painted through one of the painted kettle bottoms. For it is reasonable to infer that the person who was responsible for painting the line through the kettle bottom, in close proximity to two other kettle bottoms, noticed these three dangerous roof conditions at that time and highlighted them for additional roof support, particularly in view of the fact that the kettle bottom cluster was highlighted with the identical color spray paint as the subject line painted on the roof. 22 FMSHRC at 863, 865; *see Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (substantial evidence standard may be met through reasonable inferences drawn from indirect evidence). This conclusion is supported by the practice of Eagle Energy's foremen who identify kettle bottoms with spray paint to alert roof bolters that additional roof support is needed. 23 FMSHRC at 1108-09.

Eagle Energy section foremen Larry Sanders, Thomas Fisher and Carter Miles all maintained they could not be certain whether the line through the kettle bottom, depicted in the photographic evidence, was a centerline, a belt hanger line, or some other unidentifiable line. Gov. Exs. 11A-C and 11E. For example, when provided with the photographs of the painted kettle bottom cluster taken by inspector Gartin, Saunders claimed he was unable to identify any lines depicted in the photographs that were painted on the roof in the vicinity of the kettle bottoms.³ Tr.II 540-42; Gov. Exs. 11A-C and 11E.

The foremen's inability to identify the lines in proximity to the painted kettle bottom cluster shown in the photographs might be plausible if they had never personally observed the area. However, the citations in issue charged these foremen with the repeated failure to identify dangerous roof conditions during their mine examinations. These dangerous conditions were observed by MSHA during the course of a fatal accident investigation. It is reasonable to conclude that in the days following February 26, these foremen viewed the cited painted kettle bottom area after it was first observed by MSHA, particularly since it was located in a heavily traveled area of the mine. Thus, the purported inability of Saunders, Fisher and Carter to identify guidelines routinely painted on the roof at their direction during the mining cycle lacks credibility.

On the other hand, The Secretary presented credible evidence that the subject line drawn through the kettle bottom was a centerline. In this regard, I credit the testimony of Richard Keith Casto, an Eagle Energy miner with 24 years experience, including past experience as a continuous miner operator, that the line intersecting the kettle bottom was a centerline. Tr.I 197-99, 244-49.

Having concluded the subject line was a centerline, the focus shifts to who painted the centerline and when the centerline was painted. As previously noted, the Commission has

³ The evidence reflected there were two lines in the photographs, one of which was a centerline and the other was a belt hanger line.

concluded the kettle bottom cluster in by the dumping point was exposed during the normal mining cycle during the day shift on February 24, 1998. It follows that the centerline through the kettle bottom was painted during the day shift on February 24, 1998. Larry Saunders was the day shift section foreman during the relevant period. Eagle Energy does not contend that anyone else was directly responsible for the section's mining activities during that shift.

Saunders denies the line drawn through the kettle bottom was painted by him or at his direction. In addition, Saunders asserts that he never observed either the line painted through the kettle bottom, or the kettle bottom cluster. In the absence of any evidence that another individual was directly responsible for mining of the section during the day shift on February 24, Saunders' denials simply are not credible. In this regard, it has been noted that it was not surprising that Eagle Energy management personnel would be reticent to admit knowledge of the presence of hazardous unsupported painted kettle bottoms during the two day period from February 24 to February 26, 1998, that immediately preceded a fatal rib-roll related roof accident. 22 FMSHRC at 872.

Assuming, for the sake of argument, that Saunders was not the foreman responsible for painting the centerline, Eagle Energy's reported inability to determine the true identity of the responsible foreman is not material to the issue of unwarrantable failure. The centerline was painted on February 24 by, or under the supervision of, a section foreman. A section foreman is a mine operator's agent.⁴ At common law, acts and knowledge of an agent are attributable to a principal. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000) citing *Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979).

The Commission consistently has held, based on common law principles of agency, that the negligent acts of a foreman are imputable to a mine operator for penalty assessment and unwarrantable failure purposes, even in instances where an operator is unaware of a foreman's negligence. *Mettiki Coal Corporation*, 13 FMSHRC 760, 772 (May 1991); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-98; (February 1991); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (August 1982) ("*SOCCO*").

Thus, even Eagle Energy's claimed ignorance of the identity of the supervisor responsible for painting the centerline is not a defense. Put another way, Eagle Energy cannot, as a matter of law, insulate itself from the extremely high negligence manifest in this case by a supervisor based on its assertion that it is unable to determine the identity of that supervisor.⁵

⁴ Section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine . . ." 30 U.S.C. § 802(e).

⁵ With respect to the issue of the ultimate burden of proof, it is important to distinguish the act of painting the subject centerline, from the act of painting the kettle bottoms. Contrary to

Although Eagle Energy cannot avoid responsibility for knowing which of its foremen painted the centerline, the Secretary bears the burden of proving that Eagle Energy's conduct was unwarrantable. *Garden Creek Poccahontas Co.*, 11 FMSHRC 2148, 2152 (Nov, 1989). Similarly, the Secretary bears the ultimate burden of proof with respect to establishing when the kettle bottom cluster was painted. The ultimate burden of proof, also known as the burden of persuasion, never shifts and remains with the Secretary. Courts, however, have noted that, "[u]nfortunately, the etymology of the phrase 'burden of proof' is such that the phrase can be used to mean solely the burden of persuasion, solely the burden of production, or both." *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 734 (3rd Cir. 1993). The burden of persuasion requires a party to prove the fact in issue. *Id.* at 735. The burden of production requires a party to make a prima facie showing of the fact in issue. *Id.* at 734.

The burden of production, also called the burden of going forward, is initially borne by the party with the burden of proof. After the party with the burden of proof satisfies its burden of production by producing sufficient evidence to support its case, the burden of production shifts to the other party, who must, in turn, produce enough evidence to rebut the opposing party's case by introducing enough evidence to raise material questions of fact. *Bruner v Office of Personnel Management*, 996 F.2d 290, 293 (Fed. Cir. 1993).

The Secretary has satisfied her burden of production by demonstrating that the subject kettle bottom cluster in by the dumping point was exposed during the normal mining cycle on February 24. In addition, the Secretary presented evidence that the line drawn through one of the kettle bottoms was a centerline that was painted shortly after the kettle bottoms were exposed. As previously discussed, this evidence supports the inference that the foreman responsible for painting the centerline through the hazardous kettle bottom recognized the need for additional roof support and painted the kettle bottoms to alert the roof bolter. Thus, the Secretary has presented a prima facie case that the cluster of kettle bottoms was painted by, or at the direction of, the section foreman when first observed during the day shift on February 24, 1998.

Although the burden of proving when the kettle bottom cluster was painted remains with

Eagle Energy's claims, the Secretary should not have the burden of proof with respect to identifying the foreman responsible for painting the centerline. It is a ". . . familiar principle that, 'when the true facts relating to [a] disputed issue lie particularly within the knowledge of one party, the burden of proof may properly be assigned to that party 'in the interests of fairness.'" *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289, 1292 (9th Cir. 1993), *aff'd* at 70 F.3d 1278, *citing United States v. Hayes*, 369 F.2d 671, 676 (9th Cir. 1966) and *United States v. New York, N.H. & H.R.R. Co.*, 355 U.S. 253, 256 n.5, 78 S.Ct. 212, 214-15 n.5, 2 L.Ed.2d 247 (1957) ("the ordinary rule, based upon considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"). Between the Secretary and Eagle Energy, only Eagle Energy can know who was responsible for the subject centerline. Thus, the burden of proving when, and by whom, the centerline was painted should more properly be assigned to Eagle Energy.

the Secretary, having presented prima facie evidence on this issue, the burden of going forward shifts to Eagle Energy to rebut the Secretary's case. The fact that the kettle bottoms were painted is indisputable. Eagle Energy has failed to present any evidence concerning when the kettle bottoms were painted, relying instead on the assertion, rejected by the Commission, that the paint was doodling or graffiti.

In the absence of Eagle Energy's satisfaction of its burden of going forward, the Secretary has demonstrated, by a preponderance of the evidence, that the kettle bottom cluster was painted on February 24, 1998. After these kettle bottoms were painted, Saunders failed to note them during his onshift examination on February 24. In addition, Eagle Energy section foremen Saunders, Fisher and Miles collectively performed 16 subsequent preshift and onshift examinations during the period beginning on February 24 until the painted conditions were observed by MSHA on February 26, 1998, without noting any hazardous roof conditions. Like Saunders, Fisher and Miles also deny any knowledge of the painted kettle bottoms. Similarly, all three section foremen also deny painting, or even seeing, the centerline that was painted through the kettle bottom.

Testimony by Eagle Energy foremen that they did not see any unsupported, painted kettle bottoms during their examinations does not mean they were unpainted or otherwise undetectable. 22 FMSHRC at 870. Their repeated failure to note the painted kettle bottom cluster for approximately 17 examinations is aggravated, unjustified and inexcusable conduct constituting an unwarrantable failure whether or not they were aware of these conditions. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987).

Obviously, the repeated failure of Saunders, Fisher and Miles to note hazardous roof conditions during their examinations despite actual observation of the conditions would constitute aggravated conduct. However, even if their testimony that they were unaware of the painted kettle bottoms were credible, their lack of knowledge would be an aggravating, rather than a mitigating factor, that is imputable to Eagle Energy. A section foreman is responsible for the adequate supervision of his subordinates, as well as for his awareness of hazardous roof conditions in his section, especially those highlighted with reflective spray paint. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988); *SOCCO*, 4 FMSHRC at 1464.

Although the evidence supports the inference that the kettle bottoms were painted during the day shift on February 24, I note, parenthetically, that even if they were painted later, Eagle Energy's conduct would still be unwarrantable. The uncontroverted fact is that these dangerous roof conditions were not reported by preshift and onshift examiners even after these hazards were identified by orange reflective paint. As I previously noted, "even the failure to note hazardous roof conditions that were marked for remedial action during the course of *one* preshift or onshift examination may constitute unwarrantable conduct." 22 FMSHRC at 877 (emphasis in original).

Finally, putting aside the issue of when the kettle bottoms were painted, suppose the kettle bottoms had never been painted. Under such circumstances, the failure by the foreman responsible for drawing the centerline through the kettle bottom to note this hazardous roof condition during successive preshift and onshift examinations from February 24 through February 26 evidences a reckless disregard that could provide an independent basis for an unwarrantable failure.

In its remand, the Commission also directed me to consider the impact of the degree of obviousness of all nine cited kettle bottoms, rather than just the painted ones, on the unwarrantability and civil penalty issues.⁶ The remaining six unpainted kettle bottoms ranged from six to ten inches in diameter and were located in less frequently traveled mine areas. The unwarrantability and civil penalty determinations in the initial decision primarily were based on Eagle Energy's failure to correct the obvious painted kettle bottoms that were located in a heavily traveled area of the mine.

Given Eagle Energy's failure to note and correct the obvious, its additional failure to note six additional relatively obscure roof conditions demonstrates an additional degree of negligence when viewed from a cumulative perspective. However, while the failure to note these six kettle bottoms during mine examinations may constitute moderately high negligence, given their small size and rather remote locations, in the absence of the three unnoted painted kettle bottoms, such failure would not provide a basis for an unwarrantability finding or an increase in civil penalty.

Turning to the civil penalty issue, the initial decision imposing a total \$12,000 civil penalty relied on the duration of the unsupported painted kettle bottoms since February 24 as a basis for increasing the \$6,000 total civil penalty initially proposed by the Secretary. The Commission has directed me to reconsider my gravity and negligence findings in light of my findings and conclusions on remand. Having concluded that kettle bottom hazards remained unnoted in the examination books on February 26, although they were first observed and painted on February 24, I can find no mitigating circumstances to justify a reduction in the \$12,000 civil penalty assessed in the initial decision. In this regard, these hazardous roof conditions were obvious and posed a high degree of danger; they were located in a frequently traveled area of the mine in by the dumping point; and, despite Eagle Energy's knowledge of these hazards, the preshift and onshift examiners allowed these hazards to continue to exist for an extended period of time. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). In short, the violations were extremely grave and attributable to a reckless disregard. Accordingly, the \$12,000 civil penalty for the violations of sections 75.360(b) and 75.362(a)(1) is reinstated.

⁶ One of the cited unpainted kettle bottoms had a roof plate secured by a roof bolt driven through its center. This method was ineffective given the slicksided nature of kettle bottoms that can cause them to separate and fall from the roof at any moment. 22 FMSHRC at 863.

ORDER

_____ In view of the above, **IT IS ORDERED** that 104(d)(2) Order Nos. 7166391 and 7166392 reflecting that the cited violations of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) governing preshift and onshift examinations, respectively, were attributable to Eagle Energy, Inc.'s unwarrantable failure **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Eagle Energy, Inc., shall pay a total civil penalty of \$12,000 in satisfaction of 104(d)(2) Order Nos. 7166391 and 7166392. Payment is to be made within 40 days of the date of this decision. Upon timely receipt of payment, these consolidated contest and civil penalty matters **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Robin Rosenbluth, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

Julia Shreve, Esq., Jackson & Kelly, PLLC, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

/hs